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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 419

Marc Belding Anderson, Marvin Atlas, Lawrence Banka, Richard J. Biesanz, James Ford, Nathan Fuchs, Thomas McGraw, Donald Russell, Peter Solenberger, Vincent Stuart, Jr., Tommie Suber, Peter Werbe, William K. Zook,

Petitioners,

vs.

General Lewis B. Hershey, National Director, Selective Service System; Col. Arthur Holmes, Director, Michigan Selective Service System; Michigan Local Boards Nos. 67, 85, 93, 95, 106, 179, 186, and 303, on their own behalf and on behalf of all other Michigan Local Boards,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. ____

Mary Belding Anderson, Marvin Atlas, Lawrence Banka, Richard L. Bassani, James Ford, Nathan Fuchs, Thomas McGraw, Donald Russell, Peter Schlenberger, Vincent Stuart, E. Townsend Suber, Peter Urba, William E. Zyp,

Petitioners,

vs.

General Lewis B. Hershey, National Director, Selective Service System; Col. Arthur Adams, Director, Michigan Selective Service System; Michigan local Boards Nos. 67, 68, 69, 85, 103, 172, 186, and 401, on their own behalf and on behalf of all other Michigan local Boards,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN & THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on April 11, 1940.

Opinions Below

The decision of the Court of Appeals is unreported and is set out in the Appendix, infra, pp. 1a - 12a. The Order of Dismissal in Part of the United States District Court for the Eastern District of Michigan, Southern Division, entered June 25, 1968, is unreported and is set forth in the Appendix, infra, pp. 13a - 15a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1969. On July 10, 1969, Mr. Justice Thurgood Marshall entered an Order extending until August 11, 1969, the time for filing this Petition for Certiorari. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

Petitioners were variously classified by their respective Selective Service Boards I-A, I-A, II-S, and III-A. Each of them at some time between October, 1967, and January, 1968, deliberately and for the express purpose of protesting United States foreign policy, as manifested in participation in armed hostilities in Vietnam, dispossessed himself of his selective service registration certificate and/or classification card. Each has been declared "delinquent" by his Local Selective Service Board; those holding other than I-A Classifications have been reclassified I-A subject under the Selective Service Regulations to priority induction into the armed forces of the United States. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. §460(b)(3)] preclude judicial review of petitioners' punitive reclassifications and, in some instances, orders to report for induction?

2. Do the declarations of delinquency, punitive reclassifications and, in certain instances, orders to report for induction of petitioners for failure to have in their personal possession registration certificates and/or classification cards violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Do Selective Service Regulation 1617.1 [32 C.F.R. §1617.1], as construed and applied in this case, and Selective Service Regulation 1642.4 [32 C.F.R. §1642.4], on its face, violate the First Amendment?

Statutes and Regulations Involved

Section 5(h)(1), Military Selective Service Act of 1967, 50 App. U.S.C. §456(h)(1):

> "Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person

under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection; nor shall any such person be granted a deferment under subsection, (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term 'prime age group' means the age

group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

Section 10(b)(3), Military Selective Service Act of 1967, 50 App. U.S.C. §460(b)(3).

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Selective Service Regulation 1617.1, 32 C.F.R. §1617.1:

"Effect of failure to have unaltered registration certificate in personal possession. -- Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no

notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered."

Selective Service Regulation 1622.25, 32 C.F.R. §1622.25:

"Class II-S: Registrant Deferred Because of Activity in Study. -- (a) In Class II-S shall be placed any registrant who has requested such deferment and who is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning, such deferment to continue until such registrant completes the requirement for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever occurs first.

(b) In determining eligibility for defer-

ment in Class II-S, a student's 'academic year' shall include the 12-month period following the beginning of his course of study.

(c) A student shall be deemed to be 'satisfactorily pursuing a full-time course of instruction' when, during his academic year, he has earned, as a minimum, credits toward his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such degree. For example, a student pursuing a four-year course should have earned 25% of the credits required for his baccalaureate degree at the end of his first academic year, and 75% at the end of his third academic year.

(d) It shall be the registrant's duty to provide the local board each year with evidence that he is satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning."

Selective Service Regulation 1642.4, 32 C.F.R. §1642.4:

"Declaration of Delinquency Status and Removal Therefrom. -- (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to

Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall complete a Delinquency Notice (SSS Form 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form 101)."

Statement of the Case

The facts herein are not in dispute and are set forth herein as described by the Court of Appeals in the majority opinion. At some time between October, 1967, and January, 1968, each of petitioners herein intentionally dispossessed himself of his selective service registration certificate and/or classification card. On October 24, 1967, General Hershey, National Director of the Selective Service System, issued "Local Board

Memorandum No. 85"[1] and, on October 26, 1967, a letter to the Local Boards from the Director of Selective Service.[2] This memorandum and letter, addressed to all Local Selective Service Boards, advised Local Boards, among other things, to reclassify as delinquents all registrants who abandoned or mutilated their registration and/or classification cards.

Each of petitioners was subsequently declared a delinquent, and those not already classified I-A were reclassified same pursuant to the delinquency regulations, 32 C.F.R. §1642. Petitioners and eleven others then brought an action in the United States District Court for the Eastern District of Michigan seeking injunctive and declaratory relief against the Selective Service System and their respective Local Boards.

In response to the Government's motion, the District Court dismissed the action as to nineteen of plaintiffs and reserved action as to five plaintiffs pending receipt of further information. The District Court's dismissal was predicated upon a holding that plaintiffs were not deprived of their constitutional rights, that the delinquency regulations were valid, and that judicial review of plaintiffs' classifications was barred by Section 10(b)(3) of the Selective Service Act [50 App. U.S.C. Sec. 460(b)(3)].[3]

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1. Local Board Memorandum No. 85 is set forth in the Appendix, infra, pp. 19a-20a.

2. Appendix, infra, pp. 16a-18a.

3. The Order of Dismissal in Part of the District Court is set forth in the Appendix, infra, pp. 13a-15a.

An appeal on behalf of thirteen of the nineteen plaintiffs affected by the District Court's Order of Dismissal in Part was timely filed with the United States Court of Appeals for the Sixth Circuit.[4] Subsequently, stays of induction were issued by that Court for two of appellants.[5] On April 11, 1969, the Order below was affirmed (Judge Combs dissenting). In essence it was the rationale of the Court that neither Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968), nor Clark v. Gabriel, 393 U.S. 256 (1968), was dispositive of the issues raised in the appeal, but rather the issue for the Court to decide was whether there is a significant difference, insofar as delinquency reclassification is concerned, between a statutory exemption and a statutory deferment and, if so, does the procedure have a reasonable basis?, does it have any legislative or judicial sanction?, and is it nevertheless a penal provision so that unilateral agency action is proscribed? The Court concluded there is a significant difference between a statutory exemption and a statutory deferment -- that is, in its view, an "exempt" person is predetermined to be outside the [Selective Service] System while a "deferred" person is within the System. The Court then went on further to conclude that the procedure does have a reasonable basis with legislative sanction and is not, the majority held, a penal provision. Judge Combs in a brief dissent indicated he was of the opinion that

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4. No appeal was taken for six plaintiffs who either had not dispossessed themselves of their cards, or were not reclassified, or, in the interim, had had their classifications restored.

5. Peter Solenberger and Thomas McGraw.

the delinquency regulations are punitive and invalid for that reason.

Reasons for Granting the Writ

Certiorari should be granted in this case because it poses a number of questions not decided in Oestereich v. Selective Service Local Board No. 11, supra, the resolution of which will affect a substantial number of registrants reclassified from various classifications pursuant to Local Board Memorandum No. 85 and the Hershey letter of October 26, 1967.[6]

A. Certiorari should be granted because the decision below misinterprets this Court's decision in Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968).

6. In Breen v. Selective Service Local Board No. 16, No. 65, Oct. Term, 1969, cert. granted, 37 U.S.L.W. 3410, the relevant statistics demonstrating a substantial impact of the questions upon the rights of selective service registrants were set forth in considerable detail in the Petition for Certiorari (pp. 7-8). In statistical terms, although the figures are not available, a resolution of the issues posed herein will have an even greater impact upon the rights of registrants under the Selective Service System, for Breen poses only the limited question of the effect of Section 10(b)(3) upon registrants reclassified from II-S, whereas in the instant case other regulatory deferments having their basis in the Selective Service Act are also involved.

The Court of Appeals deemed it a significant line of demarcation that an exempt person is predetermined to be outside the System, whereas, instead, a deferred person is within the System. It went on to point out that, if a person is outside the System, the performance or non-performance by him of such collateral duties as possessing his registration certificate will have only a "minimal effect" on the functioning of the System. But, it added, in the case of a deferred person, the impingement on the System of failure to perform a wide range of collateral duties such as registration, completion of classification questionnaires, notification of change of status or address, reporting for medical interview or physical examination, etc. is substantial.

This proceeds, we think, from a fundamentally untenable premise that exemptions are somehow of a more permanent character than deferments. Obviously this is not the case, for few exemptions are in fact permanent, and some certainly are of a less permanent nature than some deferments which the Court concludes are "within the System". For example, a ministerial student, Class IV-D (Oestereich), is "exempt"; a father or an occupant of an essential occupation, Class III-A, is "deferred". But the deferment so-called will continue, unless removed by the President, as long as he remains a father. Thus his obligation for service is not in fact deferred. He is in reality exempt in the same sense a ministerial student is, for there is no liability for service in either instance so long as each does not change his circumstances.

Obviously, it does not hold true in these situations that performance or non-performance of his duties under law by a registrant holding an

exemption will have any greater effect on the System than persons possessed of a deferment. A registrant may, for any of a variety of reasons, cease to be a divinity student and hence cease to be eligible for his "exemption". It would seem at least as likely that this could happen should a person in an essential occupation deferment classification II-A leave that occupation. Even less likely is it that a father will cease to be such. And what of persons classified I-Y by reason of physical, mental, or moral circumstances deemed to make them unfit for service in other than time of national emergency?, or persons permanently "deferred" by reason of physical disqualifications, IV-F?

As the Court of Appeals pointed out, this Court in Oestereich did not articulate any difference between exemption and deferment. There is, we submit, a sound reason as to why it did not, for there is in fact no logical differentiation which can be made.

The Court of Appeals found it necessary to attempt a distinction because it is clear that the deferment granted to undergraduate students under the Selective Service Act is no less mandatory than the exemption of divinity students provided for therein. The language of Section 6(h)(1) of the Act utilizes the imperative "shall" in directing the President to provide for the deferment from training and service in the Armed Forces of persons satisfactorily performing a full-time course of instruction at a college, university, or similar institution of learning who requests such deferment. Moreover, it has provided that the deferment "shall continue" until that person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or

attains the twenty-fourth anniversary of his birth, whichever first occurs.[7]

If there is no valid basis for distinguishing between exemptions and deferments, is there, nevertheless, a reasonable, controlling distinction which can be made between so-called statutory and non-statutory deferments? The Court of Appeals in its Opinion remarked that, having concluded that the removal of statutory deferments pursuant to the delinquency regulations was not subject to pre-induction challenge, it followed, a fortiori, for I-A, I-Y, and III-A Classifications. Again, we think the distinction is not solidly grounded in logic.

Three of petitioners were classified I-Y, and one was classified III-A.[8] Section 6(h)(2) of the Act provides:

> "... the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the armed forces (1)

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7. We wish to emphasize that the 1967 Act changed the provisions of Section 6(h)(1) so as to make student deferments mandatory, whereas previously the language was discretionary, authorizing the President to provide for such deferment if he found it to be necessary to the maintenance of the national health, safety, or interest, and the implementing regulations (32 C.F.R. §1622.25) left it to the discretion of the Local Boards to provide for the deferment of individual students.

8. Classified I-Y were Marvin Atlas, James Ford, and Nathan Fuchs. Classified III-A was Marc Anderson.

> of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective." [50 App. U.S.C. Sec. 456(h)(2).]

Thus, Congress has authorized the President, should he see fit, to provide for the deferment of persons meeting certain stated qualifications. Upon the President exercising his authority thus defined, that exercise has the same effect as if Congress itself had directly ordered the deferment. In other words, regardless of whether the President provides for the deferment as the result of an authorization of Congress or pursuant to its mandate, the effect of the President's act is the same: persons falling within the boundaries of the deferments thus promulgated are, as a matter of law, entitled to the classifications prescribed. Applying the principle of Oestereich, it seems clear, therefore, that a registrant deferred by reason of determination of his Local Board that he satisfies the criteria indicated by Congress and effectuated by the President is entitled to judicial review of a claim of unlawful removal of his classification, without having to make the choice of either defying induction and inviting criminal prosecution or submitting to induction and thereafter seeking judicial review through habeas corpus. In Oestereich, this Court specifically relieved the registrant of that dilemma so as not to construe Section 10(b)(3) "with unnecessary harshness", Oestereich, supra, at 240.

B. Certiorari should be granted to settle the important question of whether judicial review of claims that a statute or administrative regulations are unconstitutional per se and as applied is precluded by Section 10(b)(3).

Justice Harlan, concurring in Oestereich, stated

> "The pivotal language of §10(b)(3), for present purposes, is the statute's proscription of pre-induction judicial review 'of the classification or processing of any registrant....' I take the phrase 'classification or processing' to encompass the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction. I do not understand that phrase to prohibit review of a claim, such as that made here by petitioner, that the very statutes or regulations which the board administers are facially invalid." 393 U.S. at 240 (emphasis supplied).

Precisely such a claim is raised here, for it is claimed that the delinquency and reclassification procedures are without statutory authorization and, further, for reasons to be developed later, both on their face and as applied, deprive the registrant of due process of law. The Government has expressed similar doubts concerning the constitutionality of the delinquency procedures. In its brief in Oestereich, at p. 54, it states:

> "It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent with the Selective Service Act."

The Government in its brief also conceded that the discretion given to Local Boards under Selective Service Regulation 1642.4(c) to restore a registrant's prior classification presented a serious question as to whether the Regulations did not conflict with the Act. The possibility of constitutional infirmities was also recognized by the Government including the delegation of power to Local Boards "without standards for the exercise of sweeping discretion given them by the regulations," and the "absence of any specified nexus or reasonable relationship between the violation which triggers reclassification and induction, and the registrant's status vis-a-vis the Selective Service System [which] might be viewed as inconsistent with due process notions" (p. 56).

In National Student Association, Inc. v. Hershey, No. 21903, (C.A. D.C., June 6, 1969), the Court in Footnote 18 of its opinion also expressed doubts concerning the constitutionality of the delinquency regulations.

> "Since we conclude, infra, that the deferment policy of the Hershey directive is, in effect, 'basically lawless,' appellants' challenge to at least that much of the directive may also escape the bar of Section 10(b)(3) under the narrow holding of Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968). It may be, as appellants contend, that the delinquency regulations themselves -- held lawless under Oestereich when in conflict with express statutory provisions -- are likewise completely unauthorized and thus subject to challenge under the Oestereich rationale. In view of our holding that Section 10(b)(3) is not a bar in any event, we need not decide this question." (Slip opinion at 10.)

Under the rationale of Mr. Justice Harlan, Section 10(b)(3) would bar only those suits which seek review of "discretionary, factual, and mixed law-fact determinations" of a Selective Service Board, and not those which allege that "the very statutes or regulations which the board administers are facially invalid". Oestereich, supra, at 240. We do not think Justice Harlan's interpretation is inconsistent with the majority opinion because therein it is expressly stated that conduct which is in fact "basically lawless" may be challenged because "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed

exemption is deserved." 393 U.S. at 238. Thus, pursuant to the Harlan position, Section 10(b)(3) would have no application to the instant suit which challenges the Hershey directive and the delinquency regulations on their face.

C. Certiorari should be granted to decide whether petitioners' declaration of delinquency and priority induction was punishment, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), and, if so, whether those procedures violate the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment.

In the interests of brevity and conservation of space, petitioners will forego repetition of the Mendoza-Martinez argument presented at length to the Court in Cestereich and described by Mr. Justice Harlan in his concurring opinion in Cestereich as "non-frivolous". Cestereich, supra, at p. 244, n. 6. The Mendoza-Martinez argument is set forth in detail at pp. 15-17 of the Petition for Certiorari in Breen v. Selective Service Local Board No. 16, No. 65, Oct. Term, 1969, cert. granted, 37 U.S.L.W. 3410, and petitioners incorporate that material by reference here. This claim differs from Breen in one significant respect: five of petitioners were not reclassified due to the fact that at the time they surrendered their cards they were already classified I-A. When delinquency is linked to reclassification, however, a registrant at least has the opportunity, under the Selective Service System hearing and appellate procedures (Regulations 1624 through 1627), to try to persuade

administrative officers to return his initial or deferred exempt classification. However, those petitioners who were classified I-A at the time of their declaration of delinquency were deprived even of that benefit. Thus, no opportunity whatsoever exists to challenge the delinquency determination within the Selective Service System procedures.

D. Certiorari should be granted to decide whether Regulation 1642.4, upon which petitioners' delinquency, re-classification, and induction orders are based, is vague and overbroad.

E. Certiorari should be granted to settle the important question of whether petitioners' surrender of their Selective Service cards was conduct protected by the First Amendment.

The reasons for granting the writ to review Issues D and E are identical to the reasons set forth at pp. 21-26 of the Petition for Certiorari in Breen v. Selective Service Local Board No. 16, supra. Petitioners, for brevity's sake, respectfully refer the Court to that material.

Conclusion

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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Dated: August 7, 1969

OPINION

No. 18976

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARC BELDING ANDERSON, ET AL.,
Plaintiffs-Appellants,

v.

GENERAL LEWIS B. HERSHEY, NATIONAL DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided April 11, 1969.

Before: PHILLIPS, COMBS, and COFFIN*, Circuit Judges.

COFFIN, Circuit Judge. At some time between October, 1967, and January, 1968, each of the appellants in this case intentionally dispossessed himself of either or both his selective service registration and/or classification cards. On October 24, 1967, General Hershey, the National Director of the Selective Service System, issued "Local Board Memorandum 85" which directed local boards to reclassify as delinquents all registrants who abandoned or mutilated their registration and/or classification cards.[1] Each of the ap

* The Honorable Frank M. Coffin, United States Circuit Judge, First Circuit, sitting by designation.

[1] Local boards were given the following advice in the Memorandum:

"Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

pellants was subsequently reclassified under the Delinquency Regulations, 32 C.F.R. § 1642.[2] Appellants then brought an action in the United States District Court for the Eastern District of Michigan seeking injunctive and declaratory relief against their respective local boards. In response to the government's motion, the district court dismissed the action as to nineteen of the appellants and reserved action as to five appellants, pending receipt of further information.[3] The district court's dismissal was based on a holding that plaintiffs were not deprived of their constitutional rights, that the Delinquency Regulations were valid, and that judicial review of appellants' classifications was barred by § 10(b)(3) of the Selective Service Act, 50 App. U.S.C. § 460(b)(3).

As with other courts we have waited for *Oestereich v Selective Service System*, 393 U.S. 233 (1968). We now have the illumination not only of *Oestereich* but also of *Clark v Gabriel*, 393 U.S. 256 (1968). But the light focuses only at the ends of our particular stage, not the entire. For *Oestereich* dealt with, and was meticulously confined to the application of the delinquency regulations to a statutory exemption, while *Gabriel* dealt with a preinduction attack based on specific allegedly improper con-

(C) At the expiration of the time for taking an appeal if no appeal has been taken and the delinquency has not been removed, except the registrant shall report for induction or for civilian work in lieu of induction [in Class I-O] at a time fixed by or in the board's discretion at a place fixed by the board or by the United States Attorney for prosecution.

[2] Originally the cases of appellants could be divided according to the following categories: 7 V-H-S undergraduate students; 1 V-A registrant unable to meet physical or mental standards for I-A; 2 A-O or I-O full-time conscientious objectors; 1 III-A registrant with children or deferred because of extreme hardship to dependents; 1 [illegible]

[3] At the time of argument in this case the district court had entered no further orders with regard to these five plaintiffs.

siderations motivating a decision to reclassify.[4] The middle ground remains for us: not the bringing to bear of specific factual judgments on a particular case, not a deprivation of a statutory exemption by the delinquency regulations, but the deprivation of statutorily defined deferments by the same regulations.

It is not only possible but plausible to construct, as appellants in effect have done, a syllogism: *Oestereich* decrees that use of the delinquency regulations to take away a Congressionally granted exemption for "activities or conduct not material to the grant or withdrawal of the exemption" is "blantontly lawless"; a deferment, particularly a student deferment, is a comparable status, also legislatively defined; it is therefore equally immune from the application of the delinquency regulations.[5] *See also Breen v. Selective Service Local Board No. 16*, No. 32345, 2d Cir., January 10, 1969, dissenting opinion of Judge Feinberg.

We decline to adopt the syllogism. We note first that the Court restricted itself to the statutory exemption problem, without giving any clear guidelines of the intermediate situation confronting us. This restraint forces us to ask the basic question: is there any significant difference, so far as delinquency reclassification is concerned, between a statutory

[4] Prior to the Supreme Court's opinion in *Clark v. Gabriel*, *supra*, there had been suggestions in some lower court opinions that § 10 (b) (3) was an unconstitutional restraint of judicial review, *Peterson v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968) or that § 10(b)(3) was inapplicable in cases involving First Amendment questions, *Wolff v. Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967). *Gabriel*, while upholding the validity of § 10(b)(3), also made clear that the Congressional prohibition of pre-induction review was not absolute. It is not enough, however, to assert that one's classification was arrived at in violation of the Constitution. *See* n. 11, *infra*.

[5] We could add that pre-induction challenges of delinquency revocations of statutory deferments would meet the criteria of avoiding the review of a complex factual determination and of posing a question (the validity of regulations) beyond the competence of a Selective Service board, discussed by Mr. Justice Harlan in his concurring opinion in *Oestereich*; and that the *Oestereich* dissenters in their footnote 9 intimated that the reasoning of the majority "may just as plainly" apply to student deferments.

exemption and a statutory deferment? If there is, we ask the further questions: does the procedure have a reasonable basis? does it have any legislative or judicial sanction? is it nevertheless a penal provision, so that unilateral agency action is proscribed?

The Court in *Oesterich* did not articulate any difference between exemption and deferment. The presence of any difference is divined only from its repeated confinement of its ruling to the case of one exempt by statute. We are forced to probe the question whether there is a significant difference in the status (exemption versus statutory deferment) being altered by the delinquency regulations. We think such a difference exists. In the case of an exemption, the Congress has made the decision that qualifying persons shall be beyond the pool of manpower available for military purposes. In the case of a deferment, the Congress has tried to set priorities, to provide predictability, and to guarantee equality of treatment — but not immunity — for those within the available pool of manpower. An exempt person is predetermined to be outside the system; a deferred person is within the system. We deem this is a significant line of demarcation.

If a person is outside the system, the performance or nonperformance by him of such collateral duties as possessing his registration certificate will have only a minimal effect on the functioning of the system. Perhaps the only effect would be to increase a local board's difficulty in reclassifying him should his status change (e.g., should a clergyman withdraw from his profession) and should he not notify the board of this change or of a change of address.[5] But in the case of a deferred person, the impingement on the system of failure to perform a wide range of collateral duties — registration itself, returning a completed Classification Questionnaire, notifying a board of change of status or address, re-

[5] Even this possibility would not apply to those whose status does not depend on occupation, such as veterans or sole surviving sons or brothers where the father or other brothers and sisters were killed in action.

porting for a medical interview or physical examination, possessing a certificate providing evidence that the registrant is satisfactorily pursuing a full-time course of instruction, etc. — is substantial. Coming specifically to undergraduate (II-S) deferments, on which appellants lay greatest stress, we observe that the regulations are on the one hand designed to insure to the student both predictability and equality of treatment; on the other hand, they seek to insure sufficient information both in the files of the system and in the possession of the individual, *United States* v. *O'Brien*, 391 U.S. 367, 379 (1968), so that a continuing relationship may make feasible response to changed conditions — e.g., a change of status by the registrant or a finding by the President in accordance with section 6(h)(1) of the Selective Service Act, 50 U.S.C. App. § 456(h)(1), that the needs of the Armed Forces require a change in student deferment policies.

Were widespread failure to comply with the adjective requirements of the system to be subject only to the sanction of criminal prosecution, the effect on both the selective service system and individual violators would be unnecessarily harsh and burdensome. As to the former, the delay, the uncertainty of meeting time-limited quantitative goals,[7] the load on prosecutors and courts would vastly hobble its functioning. As to the latter, fines and jail sentences might in a large proportion of the cases be rightly deemed an excessive response. The concept of this lesser option of terminating or suspending a privilege for delinquency is not uncommon in organizations far less militarily oriented than Selective Service — e.g., clubs, unions, and educational institutions.[8]

[7] Unlike other governmental agencies, the local boards of the Selective Service System must fill established inviolate quotas. The nature of this obligation demands efficiency in operations which in turn necessitates the maximum availability of information concerning the status and location of registrants within the jurisdiction of the various local boards.

[8] As to whether or not, in the circumstances before us, the delinquency regulations can be construed as penal, we discuss below

tion.[15] This in turn lends superficial support to the
nt that the aims of delinquency reclassification in
e were retribution and deterrence. However, the ele-
nt, retribution and deterrence appear only in so far
are always present in any compliance-securing process,
e not present in the same form or with the same
in criminal proceedings.[16] Finally, as we have earlier
d, the delinquency provisions are directed toward
the satisfaction of the legitimate needs of the Selec-
ice System. We cannot say that delinquency re-
ation and induction are excessive. In short we do not
that delinquency proceedings involve that quality
ent which in our legal system necessitates the use of
proceedings.[17]

this spirit we have discussed the application of
inquency regulations to undergraduate IIS defer-
Having upheld the validity of the delinquency regu-
n that context we hold that they may be applied
the I-A-D and III-A classifications. Of course
registrants who are declared delinquent and ordered to
induction may ultimately be rejected for service
of the factors which originally led to their I-A classi-
n.

Thus, we affirm the opinion of the district court. Appellants may, of course, seek to challenge their classifications as having no basis in fact either on habeas corpus after induction, or as a defense to a criminal prosecution for refusal to submit to induction. Normally, their falure to exhaust the administrative remedies provided by 32 C.F.R. § 1642.14 would be a bar to judicial review. *See, e.g., Dunn* v. *United States*, 383 F.2d 357 (1st Cir. 1967), *cert. denied*, 390 U.S. 982 (1968); *Ashton* v. *United States*, 404 F.2d 95 (8th Cir. 1968); *Campbell* v. *United States*, 396 F.2d 1 (5th Cir. 1968); *United States* v. *Hogans*, 369 F.2d 359 (2d Cir. 1966). However, there is no indication that appellants were apprised of the existence of the administrative remedies. Therefore, we believe that fairness will be served by requiring the Selective Service System to give appellants the opportunity to utilize their administrative remedies and thereby open the possibility that the delinquency may be cured.

Affirmed.

COMBS, Circuit Judge (Dissenting). I am of the opinion that the delinquency regulations are punitive and invalid for this reason. I, therefore, respectfully dissent.

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case where dependents would become public charges. However, Congress has not seen fit to grant an exemption to persons qualifying for a III-A classification. Moreover, we note that if appellant's view were adopted, criminal prosecution and conviction would result in even greater hardship to dependents of registrants formerly classified III-A. Finally, we note that the 1967 changes in the Selective Service Act Regulations restricted the availability of III-A deferments in order to prevent "pyramiding" deferments into an exemption. 32 C.F.R. § 1622.30(a) (1967); H.R. No. 267, 90th Cong., 1st Sess., 1967 Code, Cong. & Admin. News 1308, 1324.

United States District Court
Eastern District of Michigan
Southern Division

On June 14, 1968 the court issued an order to show cause why this action shall not be dismissed. The said order to show cause set out the conclusions of the court as follows:

"1. That the actions complained of in the plaintiffs' complaint do not set forth a deprivation of their constitutional rights, inasmuch as their activities in turning in their Selective Service registration cards were not a form of protected free speech. U.S. v. O'Brien, 36 U.S.L. 4469 (May 27, 1968).

"2. That the delinquency regulations, 32 C.F.R. 1642 and 32 C.F.R. 1631.7(a)(1), are a valid exercise of the rule-making authority of the President and that the invoking of those regulations to terminate a deferment which is subject to the rules and regulations of the Selective Service System or to order the priority induction of a registrant is not a deprivation of federal constitutional rights. Mills v. U.S., 384 F.2d 943 (9th Cir. 1967), cert. denied, 36 U.S.L. 3473 (June 10, 1968).

"3. That judicial review of the classification of any registrant is prohibited by statute until the registrant has failed to re-

spond to an order to report for induction. 50 App. U.S.C. §460(b)(3). An exception to this rule arises when a registrant has been reclassified fit for induction, or has been ordered for induction, for violation of the delinquency regulations, where he asserts a right to a statutory deferment or exemption which is not qualified by or subject to the rule-making authority of the President, including the delinquency regulations. Brief of the Solicitor General, Oestereich v. Selective Service Local Board No. 11, No. 1246, cert. granted, 36 U.S.L. . 3443 (May 20, 1968); memorandum of the Solicitor General and denial of application for writ of injunction or stay, Shiffman v. Selective Service Local Board No. 5, 36 U.S.L. . 3451 (May 27, 1968); denial of application for stay, Zigmond v. Selective Service Local Board No. 16, 36 U.S.L. . 3451 (May 27, 1968)."

The court having previously received the benefit of briefs and arguments of counsel and no cause satisfactory to the court having been shown why the action should not be dismissed as to the following plaintiffs, Marc Belding Anderson, Marvin Atlas, Fred Baker, Lawrence Banka, Richard J. Biesanz, James Ford, Nathan Fuchs, Harold Jackson, Frank H. Joyce, James Lipson, Thomas McGraw, Thomas L. Nixon, Donald Russell, Peter Solenberger, Vincent Stuart, Jr., Tommie Suber, John Vanden Brink, Peter Werbe, and William K. Zook, IT IS HEREBY ORDERED as to these plaintiffs, the action be and is hereby dismissed.

It appearing to the court that further information is required concerning the plaintiffs Benjamin Ford, Ronald Halstead, James A. Mason and John McNaughton, the court will withhold its decision until the further order of the court as to the said plaintiffs Benjamin Ford, Ronald Halstead, James A. Mason and John McNaughton. IT IS HEREBY ORDERED that within fifteen days from the date hereof, these plaintiffs and the defendants shall furnish the court additional information concerning the respective service classifications of these plaintiffs.

IT IS FURTHER ORDERED that the court at this time being satisfied that the plaintiff Leland D. Sanderson has a statutory deferment of IV D as a minister of religion or divinity student, the action shall not be dismissed as to him, and the court reserves final judgment pending such pertinent information concerning the Selective Service classification status of the said Leland D. Sanderson.

Dated June 25, 1968.

Theodore Levin
United States District Judge

New York Times, Thursday, November 9, 1967

Texts of Letter and Memo on the Draft

Special to The New York Times

WASHINGTON, Nov. 8 -- Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards

THE LETTER

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being

in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the regis-

trant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

MEMORANDUM

Subject Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-C, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been